No. 14738.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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SOUTHWESTERN PUBLISHING CO., INC., a corporation, A. E. CAHLAN, NEVADA CITIZENS COMMITTEE, INCORPORATED, SOUTHERN NEVADA CHAPTER, a corporation,

*Appellants,*

*vs.*

CHARLES LEE HORSEY,

*Appellee.*

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**Appeal From the United States District Court for the District of Nevada.**

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## APPELLANTS' REPLY BRIEF.

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### I.

### Reply to Appellee's Answer to Appellants' Contention That Trial Court Erred in Admitting in Evidence the 1946 and 1950 Clark County Election Returns to Appellants' Prejudice.

The 1946 and 1950 election returns of Clark County were offered and received over defendants' objection as proof of "a state of opinion in Clark County" [R. 110] and "as possible evidence of the effect of the advertisement in question upon the people of Clark County" [R. 179] and "for the purpose of contrast." [R. 111.]

The admission of these election returns as proof of the opinion of Clark County inhabitants of Judge Horsey's reputation, resulting from the publication of the advertisement, was viciously prejudicial to the defendants. The election returns are not only hearsay evidence, but were completely irrelevant and immaterial. There was no rational or logical connection between them and the reputation of the plaintiff, as the same might have resulted from the advertisement complained of. They were competent proof of one thing only, and that was the number of votes cast for each candidate.

It is difficult to conjure evidence which would have been any more prejudicial than these election returns. From them the jury was permitted to find that those who voted for Judge Horsey's opponent, at least in excess of the votes received by his 1946 opponent, did so because of damage to his reputation resulting from the advertisement. In other words, the jury was permitted to find that, as a result of the advertisement, Judge Horsey's reputation was actionably damaged in the viewpoint of thousands of voters who voted for his opponent. By further inference from this so-called concrete evidence, the jury was permitted to find that his reputation must have also been maligned in the minds of thousands of others who did not cast their votes.

There are many and sundry reasons why voters cast their ballots as they do. The personalities of the candidates influence them. A person may in 1946 have voted against Judge Horsey's opponent for many reasons. In 1950, they may have voted for Judge Horsey's different opponent for many reasons. The population markedly changed in Clark County in the intervening four years and the political leanings of the new inhabitants may have

been against Judge Horsey's party. Judge Merrill may have made a more effective campaign in Clark County than did Judge Horsey. It is impossible to point to one particular event and say that governed the nature and result of the vote. Yet the Trial Court, by admitting these election returns, permitted the jury to find that the change in votes from 1946 resulted solely from the advertisement and was direct evidence of a change in opinion as to the reputation of Judge Horsey brought about solely by means of the advertisement. The election returns were, therefore, not relevant proof of a change in opinion, resulting from the advertisement complained of.

The 7,020 who voted for Judge Merrill were not in Court. They did not testify they had read the advertisement and, if so, the effect of the advertisement on their opinion of Judge Horsey or even whether they had an opinion. The defendant had no opportunity to cross-examine to test the evidence.

Judge Horsey would not have been permitted to testify that he had talked to John Smith or John Doe and they told him they had read the advertisement in the paper and had changed their opinion about him and decided to vote against him. What John Smith and John Doe allegedly said would be hearsay. Their statements out of Court, not under oath, and without an opportunity to be tested by cross-examination, would be hearsay. How then, can Judge Horsey be permitted to say that those who voted against him as shown by the official election returns had done so solely because his reputation in their opinion had been impugned by the political advertisement complained of. He cannot, and the introduction of the election returns as proof of damage to Judge Horsey's reputation was erroneous and highly prejudicial to the defendants.

It is impossible for this Court to say that the election returns in no way influenced the verdict of the jury, either as to the question of liability or the question of damages and was, therefore, harmless error.

The only real explanation for the jury's verdict of $10,000 compensatory damages and $15,000 punitive damages was their consideration of the prejudicial election returns.

Without the prejudicial election returns before them, the jury quite likely would have brought in a verdict of no cause of action and, if not, then their verdict would have been in a nominal amount. It is to be noted that the plaintiff did not move for a directed verdict and that the Trial Court submitted to the jury the question of whether the advertisement was libelous. This demonstrates that neither plaintiff nor the Trial Court felt the advertisement to be libelous *per se*. It is well settled that whether or not a publication is libelous *per se* is a question of law for the Trial Court to determine and not the jury. (*Brewer v. Hearst Pub. Co.,* 185 F. 2d 846, 849 (C. C. A. 7th, 1950); *Estill v. Hearst Pub. Co.,* 186 F. 2d 1017, 1021 (C. C. A. 7th, 1951); *Howard v. Southern California Associated Newspapers,* 213 P. 2d 399, 402 (Cal., 1950); *Frieman v. Mills,* 217 P. 2d 687, 691 (Cal., 1950); 53 C. J. S. 335, 336.) Therefore, it must be taken that both plaintiff and the Trial Court construed the language of the advertisement to be ambiguous and capable of two meanings, one libelous and the other not. (*Estill* case, *supra.*) In fact, Judge Horsey on the witness stand admitted that, as far as he was concerned, the advertisement only implied and indicated that he was in association with labor racketeers. In other words, Judge Horsey admitted that this advertisement, if libelous, was so only because of an innuendo, and therefore not libelous

*per se,* but *per quod.* [R. 123.] (*Brewer* case, *supra.*) In his answering brief on appeal, Judge Horsey further recognized the weakness of his case by laboriously devoting thirteen pages in argument in an attempt to convince this Court that the advertisement was libelous *per se.* It is appellants' position that the advertisement was neither libelous *per se* or *per quod* and further that the advertisement was well within the privilege of fair comment and criticism on matters of public interest. It is admitted that Judge Horsey stated he was pro-labor. [R. 115, 133.] It is clear that the definition of pro-labor was Editor Gardner's and not stated or inferred to be that of Judge Horsey. The remainder of the editorial was a statement of the Editor's opinion and analysis of the effect of the decision of the Nevada Supreme Court in the *White Cross Drug Store* case. To state an opinion that a decision of a Court or a Judge "enables the racketeers to force every business in the County into Union contracts" is not libel. It is a fair comment on, and criticism of, a decision of a Court. This advertisement, therefore, clearly meets the test of the essential elements of fair comment, namely, (1) that the publication is an opinion; (2) that it relates not to an individual, but to his acts; (3) that it is fair, namely, that the readers can see the factual basis for the comment and draw their own conclusions, and (4) that the publication relates to a matter of public interest. (*Brewer* case, *supra.*) The verdict was indeed contrary to the law and the evidence and appellants' motion to set it aside and for a new trial should have been granted. Under such circumstances, it cannot be said that the erroneous admission of the election returns was harmless error.

Not only did Appellee fail to establish a cause of action, but also, in view of his lack of proof of damages, the jury's verdict of $10,000 compensatory damages and $15,000 punitive damages can only be accounted for through their consideration of the prejudicial election returns. From those returns, the jury was permitted to find that the publication actionally damaged Judge Horsey's reputation in the opinions of the 7,020 residents of Clark County who voted for his opponent.

The only other evidence of damages were Judge Horsey's self-serving declarations as to the operation of his mind and the improper evidentiary conclusions of his son. Judge Horsey testified that after leaving the Bench he had more time and "commenced to realize the enormity of the injury, and it got so that I certainly couldn't talk to everybody that I would meet in regards to the situation" [R. 122]; that "I would hate to stop and talk with them, because it looked as though that they would have some suspicions as to my honor, and integrity * * * until I got so I didn't want to meet people, but I would take walks at night * * *." [R. 123.] That "when I got down here and realized the enormity of the injury, and the hundreds and thousands of people that had come in that I didn't know, I realized that it would take all my time and more than my time to try to meet people and disabuse their minds as to my honor and my integrity, and how could I practice law under those conditions? When the expenses of practicing law have greatly increased, and there are about seventy attorneys in Clark County, and I would have to start all over again, and give my whole attention to trying to disabuse and trying to overcome the injury I have received." [R. 124, 125.]

The substance of this testimony and the direct testimony as to damages is then that he stopped walking on the street in the daytime because he felt people were suspicious of him and took to taking his walks at nighttime and that he felt that he had to meet all the new people who moved into Clark County, who did not know him, and disabuse their minds as to his honor and integrity.

The purported force of Judge Horsey's testimony on direct examination was nullified on cross-examination when he admitted that it was his lifetime practice to take walks at night [R. 135, 136] and that as a result of losing the election, "I was broken in health, at least that my spirit had been broken." [R. 134.]

Judge Horsey's son simply testified that his father, after opening a law office in Las Vegas, "started going home early in the afternoons" [R. 141], and then was erroneously permitted by the Court to express the opinion that his father's reaction to the advertisement was "the body was there, the heart and spirit wasn't." [R. 141.]

It is, therefore, apparent that no special damages were proven. No loss of income was shown, no effect on appellee's law business was exhibited and, in fact, no out of pocket losses of any kind were attempted to be proven. The law is well settled that if the words are not actionable *per se,* there can be no recovery of general damages, but only of special damages. (53 C. J. S. 364; *Brewer* case, *supra;* and *Chambers v. National Battery Co.,* 34 Fed. Supp. 834.) On this state of the record it is obvious that the jury was influenced by the prejudicial election returns, and from them found damages to Judge Horsey's reputation resulting from the advertisement. Their admission into evidence was, therefore, not only erroneous, but prejudicial to the defendants.

In addition to the other prejudicial nature of the election returns, their importance was highlighted in the minds of the jurors by the circumstances of their admission. When they were first offered, the attorneys and the Court embarked on a two page argument on their admissibility, resulting in the admission of the 1950 returns and the exclusion of the 1946 returns. [R. 110-112.] On rebuttal, appellee again offered the 1946 returns and, after further argument by counsel in the presence of the jury, the Court admitted the returns, saying [R. 179]:

> "When it was first offered I was inclined and did rule against the admission of that evidence on the theory that the loss of an election had no bearing upon any of the merits of this case but now, in view of the statement of counsel, as to its limited purpose, *as a circumstance intending to show the effect of the publication in Clark County,* it will be admitted in evidence." (Emphasis supplied.)

The Court's comment on the admission of these returns and there being so admitted at the close of all of the testimony unquestionably highlighted and emphasized their importance in the minds of the jury. Under such circumstances, it cannot be said their admission was harmless error.

The circumstances under which error in the admission of evidence may be deemed prejudicial are set forth in 5 C. J. S. 973 as follows:

Where it is impossible (1) to determine in the particular case whether or not the jury were in the admission of the evidence complained of unduly influenced in reaching the verdict which was returned, or (2) error in admitting evidence in any particular case will more liberally be deemed to be prejudicial and to require a reversal where

the case is close on the facts or the point is not clearly established, or (3) where the manner of admitting particular evidence or the nature thereof is peculiarly such as to create a situation prejudicial to the party against whom such evidence is introduced or (4) where a verdict in favor of the party introducing the evidence is excessively large in view of the other evidence in the case.

Under all four of the above circumstances, the admission of the 1946 and 1950 election returns in evidence must be deemed prejudicial.

## Conclusion.

For the reasons stated herein and in appellant's main brief, appellants respectfully submit a decree should issue setting aside and reversing the verdict of the jury and the judgment of the lower court entered pursuant thereto.

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